Office Supreme Court, U.S.
FILED
APR 19 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. **1035**

THOR-WESTCLIFFE DEVELOPMENT, INC.

Petitioner.

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, KARL S. LANDSTROM, DIRECTOR, BUREAU OF LAND MANAGEMENT, and R. E. BOYLE, INTERVENOR-DEFENDANT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS F. McKENNA
McKENNA & SOMMER
302 East Palace Avenue
Santa Fe, New Mexico

JAMES T. McNELIS
412 Fifth St., N.W.
Washington 1, D. C.

Counsel for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdictional Statement	1
Question Presented	2
Constitutional Provisions, Statutes and Regulations Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	16
Appendix	17

CITATIONS

	Page
Cases:	
Barash v. Seaton, 256 F 2d. 714	11
Call v. Richfield Oil Corp., 101 F. Supp. 972	11, 12
Horner v. U. S., 147 U. S. 449	14
McKay v. Wahlenmaier, 226 F. 2d 35	11
McKenna v. Seaton, 259 F 2d 780	11, 12
Seaton v. The Texas Co., 256 F 2d. 718	11
Securities & Exchange Comm. v. Chenery Corp., 332. U. S. 194	4
State v. Jones, 44 NM 623	14
Whitbeck v. Hardeman, 51 F 2d. 450, aff'd 286. U. S. 444	11
Constitution, Statutes and Regulations:	
United States Constitution, Article IV Sec. 3. Cl. 2	2
Sec. 17 of the Mineral Leasing Act of 1920 as amended. 60 Stat. 951, 74. Stat. 782, 30. U.S.C. 226 (c)	7, 8
Mineral Leasing Amendatory Act of 1935, 49 Stat. 676	9
43 C.F.R. 192.43	7, 8, 9, 11, 13
Regulations Under Secs. 13, 14, 17, 28 of the General Leasing Act of February 1920, as amended August 31st, 1935	10

CITATIONS — (*Continued*)

	Page
F. R. Doc. 63—2462, Federal Register of March 8th, 1963, p. 2283	15
Administrative Decisions and Opinions:	
R. S. Prows, 66 I.D. 20	10
Opinion by Associate Solicitor on Simultaneous Filings, 64 I.D. 124	27
Warwick M. Downing, 60 I.D. 433	10
Reay v. Lackie, 60. I.D. 29	24
N. G. Morgan et al. 59 I.D. 400	10
Malcolm C. Petrie, 66 I.D. 289	10
United Manufacturing Co., 65 I.D. 106	10
Denver R. Williams, 67 I.D. 315	10
Harold Ladd Price, 67 I.D. 428	10
Signal Oil & Gas Co., Miller, July 31st, 1961, A-28626	10
The Texas Co. Et. Al. 61, I.D. 367	10
Transco Gas & Oil Corp., Et. Al., 61. I.D. 85	10
Bettie H. Reid Et. Al., 61 I.D. 1, 3	10
B. F. Sandoval Jr., Golden. Decision of Director of Bureau of Land Management	14
Miscallaneous:	
American Mercury. April 1962	31
First Annual Rocky Mountain Law Institute, 1955	10
Fourth Annual Rocky Mountain Mineral Law Institute	10
1962 Public Land Statistics	7
Report S. Bill 3311. Congressional Record Senate, July 30, 1935, 12077	9
Second Annual Institute on Oil & Gas Law & Taxation, Southwestern Legal Foundation	10
The Notation Rule—Doctrine of Sovereign Impunity of the Department of the Interior, 7 Utah Law Review, 1960-61	10, 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. .....

THOR-WESTCLIFFE DEVELOPMENT, INC.

Petitioner.

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, KARL S. LANDSTROM, DIRECTOR, BUREAU OF LAND MANAGEMENT, and R. E. BOYLE, INTERVENOR-DEFENDANT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, addressing itself to the Court through its counsel, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on January 24, 1963.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals has not been officially reported. A copy is set forth in the Appendix, *infra*,* The United States District Court for the District of Columbia did not write an opinion.

JURISDICTIONAL STATEMENT

The judgment of the Court below, affirming the District Court, bears date of January 24, 1963 and was entered on Jan-

* Page 17

uary 24, 1963. A true copy is set out Appendix, *infra*. The jurisdiction of the Court is invoked under 28 U.S.C. section 1254 (1).

QUESTION PRESENTED

Section 17 of the United States Mineral Leasing Act provides that for lands not within any known geological structure of a producing oil or gas field, "the person first making application" shall be entitled to the oil and gas lease if the lands are to be leased. This quoted provision means and heretofore has been uniformly construed as meaning the person who files first in point of time.

Where the petitioner was the person first making application in point of time and where the Secretary has decided to lease, was the Court below correct in affirming the rejection by the Secretary of the petitioner's applications because they were not filed in accordance with a new exclusive procedure for leasing established by regulation which requires that every month there shall be a simultaneous filing period of five days with all applications considered as filed on the fifth day, and a public drawing thereafter to determine by lot the "person first making application?"

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

Article IV, Sec. 3, cl. 2 of the United States Constitution provides:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

Sec. 17 of the Mineral Leasing Act as amended, 60 Stat. 951, 74 Stat. 782, 30 U.S.C. sec. 226 (c) states:

> "If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application who is qualified to hold a lease under this Act shall be entitled

to a lease of such lands without competitive bidding."

43 C.F.R. 192.43, entitled "Availability of Lands to further lease offers where non competitive lease expires, is cancelled, relinquished, or terminated," reads as follows:

"(a) Lands in cancelled or relinquished leases or in leases which terminate by operation of law for nonpayment of rental pursuant to 30 U.S.C. sec. 188, which are not withdrawn from leasing nor on a known geological structure of a producing oil and gas field shall be subject to the filing of new lease offers only after notation on the official record of the cancellation, relinquishment, or termination of such lease and only in accordance with the provisions of this section. All lands covered by leases which expire by operation of law at the end of their primary or extended terms shall likewise be subject to the filing of new lease offers only in accordance with the provisions of this section except that notation of such expiration of the leases need not be made on the official records.

"(b) On the third Monday of each month or the first working day thereafter if the land office is not officially open for business on the third Monday, the authorized officer of the Bureau of Land Management will post on the bulletin board in each land office a list by subdivision, section, township and range if surveyed or officially protracted, or, if unsurveyed, by the metes and bounds discription of the lands in leases which expired, were cancelled, relinquished in whole or in part, or terminated and which will become subject to leasing at 10 o'clock a. m. on the fifth working day thereafter together with a notice stating that the lands in such leases are subject to simultaneous filings of lease offers from the time of such posting until 10 o'clock a. m. on the said fifth working day thereafter.

"(c) Each offer to lease must conform with the acreage requirements of sec. 192.42 (d) and must be accompanied by separate checks covering the filing fee and advance rental payment required by the regulations in this chapter. Any offer not so submitted will not be accepted for filing.

"(d) If more than one offer to lease all or any part of the acreage covered by an expired, cancelled, relinquished, or terminated lease is filed during the period provided for in paragraph (b) of this section, their priorities will be determined by a public drawing in accordance with sec. 295.8 of this chapter.

"(e) Offers to lease which cover lands not within the foregoing categories and which are received in the same mail or over the counter at the same time, will be considered as having been filed simultaneously and the priority to the extent of the conflicts between them will be determined by a public drawing in accordance with the provisions of sec. 295.8 of this chapter.

"(f) If no offers to lease all or any portion of the lands in the expired, cancelled, relinquished or terminated leases are received during the period provided for in paragraph (b) of this section the lands for which no offers are received will thereafter become subject to lease in accordance with the regulations in this part."

STATEMENT OF THE CASE

The petitioner filed non-competitive oil and gas offers or applications to lease NM 0196014, W 0153852 and U 071153 (Jt. App. 23, 31, 35) at the respective and proper land offices of the Bureau of Land Management, with the required rentals and filing fees, at 10 A. M. on July 3, 1961. These filings were made June 30, 1961. The lands in the offers to lease filed by the petiat the first time that such offices were open for filings after

tioner were not lands within any known geological structure and hence non-competitive lands. The lands in the offers had been previously leased by the Department under leases NM 069088 and 069088-A, C-081177 and SL 068208. These leases had just expired automatically by operation of law by virtue of the ending of their terms on June 30, 1961 (Jt. App. 16, 17, 18, 25, 26; 55 and 57 (admissions in Answer of Secretary to the appropriate allegations in appellant's complaint)).[1] The petitioner was the first one to file offers for the lands in the expired leases after June 30, 1961. The lands were vacant, unappropriated public domain when the three offers were filed. Lands formerly in leases which have expired automatically by operation of law require no notation on the records to be restored as vacant unappropriated lands as distinguished from lands in leases which have been relinquished, canceled or terminated. No notation of any withdrawal, reservation or prior segregation or use appears on the official records or appeared when the offers were filed.

Regulation 43 C.F.R. 192.43, which became effective in 1960, established a new and exclusive system for releasing of the available public domain. This procedure requires that each month the lands that are available for releasing are to be posted on a bulletin board in the respective Land Offices. *Thereafter the lands are exclusively subject to simultaneous filings of lease offers for a period of five days with all offers deemed as filed at 10 A. M. on the fifth day regardless of when filed.* Subsequently, all offers filed regardless of the land filed for are placed in a drum or cage for a public drawing and the statutory priority or the persons entitled to the leases are determined through the drawing by lot. The lands in the appellant's offers were posted in the list of available lands on July 17, 1961 (Jt. App. 19-22, 28-30, 33, 34). The simultaneous filing period was from July 17, 1961 at 10 A. M. to July 24, 1961 at 10 A. M. with July 24, 1961, 10 A. M. considered as the date of filing of all applications and the date when the lands became subject to leasing.

---

[1] References to Joint Appendix or Jt. Appendix are to the Joint Appendix below which is part of the record on this petition.

If no one participates in a drawing for a certain tract, the lands are leased thereafter to the first one applying in point of time. If lands have never been leased, then there is no requirement of a simultaneous filing period and the lands are leased to the applicant who files first in point of time.

The appellant's offers were finally rejected *solely* because they were not filed in accordance with the required leasing procedure established by this regulation 43 C.F.R. 192.43 (Jt. App. 58, 59, 60). Respondent R. E. Boyle, under his offer NM 020325, filed during the simultaneous filing period and drew first place in the drawing held August 10, 1961 in Santa Fe, New Mexico, for the lands in the petitioner's offer NM 0196014. The Secretary of the Interior is desirous of issuing the lease to Boyle rather than to this petitioner.

In the month of July, 1961, almost 16,000 offers were filed during the simultaneous filing period in the offices of Santa Fe, Cheyenne and Salt Lake City and participated in the drawings subsequently conducted. The Secretary has stated in an Affidavit (Jt. App. 39-42) that the regulation was needed to control damage to the records, breaches of peace and disturbance in the Land Offices and to eliminate possible collusive activities on the part of his employees with certain members of the public.

The long-standing practice and procedure in the various Land Offices prior to the new leasing procedure established by 43 C.F.R. 192.43 was that lands in leases which had expired by operation of law were immediately available for new offers upon the expiration of the leases. Leases would then be issued to the first applicant in point of time in accordance with Sec. 17 of the Mineral Leasing Act, as amended.

Frequently, in the past, before 43 C.F.R. 192.43 came into effect, a number of applications would be received by a Land Office precisely at the same time either in the mail or over the counter, or in accordance with the regulation that all offers filed on the same day prior to 10 A. M. (10 A. M. commences the business day for the receiving of offers) would be considered as all filed at 10 A. M. In that case, drawings have been

conducted to resolve the actual tie in time created by the applicants filing at the same time.

The Court of Appeals affirmed the District Court in denying the petitioner's motion for Summary Judgment and in granting the respondents their Cross-Motions for Summary Judgment.

Pursuant to appropriate regulation, no leases have been or can be issued to anyone for the lands in the petitioner's offers until the conclusion of the litigation. Although the petitioner is qualified to hold the leases if granted, its qualifications are not involved in this dispute.

REASONS FOR GRANTING THE WRIT

1. This controversy is of special and continuing national importance. Since 1960, the regulation concerned, 43 C.F.R. 192.43, has controlled the distribution to citizens of the United States of the tremendously valuable oil and gas leasing rights on millions of acres of Federally owned lands. The United States, as trustee for its citizens, owns 767,766,435.40 acres throughout the various States,[2] a great proportion of which is subject to leasing for gas and oil exploration and development. The leasing and releasing of the vast but undefined deposits of oil and gas for the continuing production of a fuel vital to our national economy, was and is intended by Congress to be governed by Section 17 (c) of the Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U. S. C. sec. 226 (c), the statutory

---

[2] *1962 Public Land Statistics, United States Department of the Interior*, p. 11. The leasing of lands acquired by the United States for oil and gas development is governed by the statutory provision for public domain leasing, Section 17 of the Mineral Leasing Act, as amended. 93,288,484 acres of public domain are presently under oil and gas leases, *1962 Public Land Statistics, supra*, p. 79. No particular breakdown is available for acquired lands. Oil and Gas Leases on the public domain produced in 1962 approximately 168,944,811 barrels of petroleum; 538,644,824,000 cubic feet of natural gas; 115,509,663 gallons of gasoline and 285,448,824 gallons of liquid petroleum gas, p. 75. This does not count the considerable production from acquired lands. A portion of the above 1962 Statistics is attributable to competitive oil and gas leases, that is, lands on a known geologic structure, which leases are issued by competitive bidding. This dispute does not involve competitive leases.

plan being that "the person first making application" shall be entitled to a preference right to a lease if the lands are to be leased at all. But, however, each time the various local Land Offices throughout the country issue an oil and gas lease pursuant to the new leasing system designed by the regulation 43 C.F.R. 192.43, the basic question exists as to whether the statutory plan for leasing has been essentially violated. Each month leases are awarded only by a drawing procedure to that person who draws first place by chance or lot, instead of to the person who may first make application in point of time. In fact, under the system herein complained of, fashioned solely by the administrators, it is impossible to be a person first making application as formulated by Congress.

If this petitioner is correct in its position that the system of leasing established by the regulation is plainly contrary to the unequivocal Congressional mandate expressed in Sec. 17 (c) of the Mineral Leasing Act, then the magnitude of the violation is evident and the national significance of the error is clear.

2. The decision and the opinion of the Court of Appeals, *infra*, Appendix, squarely conflicts with the legislative and administrative history of Sec. 17 of the Mineral Leasing Act, as amended, and long established precedent and practice. The Court below in its opinion found that the meaning of the phrase "person first making application" was not plain and definite, but the opinion fails to indicate in what manner it is ambiguous. The opinion did conclude, it seems, that the language "person first making application" does not mean "first in point of time", and that regulation 43 C.F.R. 192.43 was a permissible interpretative or implementing regulation.

This petitioner can find nothing indefinite in the phrase "person first making application." It believes that the simple phrase means what the plain words obviously state, and urges

---

The term "first making" can hardly be equated with the system designed by 43 C.F.R. 192.43 which requires a drawing of all applications filed over a period of 5 days with all applications deemed as filed the 5th day *regardless of when filed*.

that 43 C.F.R. 192.43 is not an implementing or interpretative regulation but an "attempt to legislate" contrary to an unambiguous statutory mandate. The petitioner is not alone in its belief for the statutory phrase has been uniformly construed as meaning first in point of time.*

The phrase "the person first making application" appeared for the first time in the Mineral Leasing Amendatory Act of 1935, 49 Stat. 676. In 1935, the then Secretary of the Interior, Mr. Ickes, expressed his disapproval of the proposed statutory scheme when he wrote to Senator Wagner of the Public Lands and Survey Committee:

> "The provisions in Sec. 17 that gives an applicant for lease of lands not within the known structure of a producing field a preference right thereto without competition, in its present form, is believed to be subversive of the public interest. In particular, it offers an invitation and encouragement to him who in public land parlance is called a 'sooner' . . . I suggest that this proviso be eliminated." (Report accompanying S. Bill 3311, Congressional Record Senate, July 30, 1935, page 12077.)

Congress, however, disagreed with Mr. Ickes and the statutory scheme of priority to the first applicant in point of time has been the leasing law since 1935.

---

* It is to be noted that the final administrative decision (Jt. App. 58-61) did not proceed on the basis that "the person first making application" was indefinite or ambiguous or that it meant something else than the person who files first in point of time. The petitioner was denied administrative relief for the reason that under the regulation the Secretary concluded that the lands were not available when the offers were filed. The Secretary actually avoided the real issue in the administrative proceedings. Nor did the Briefs of the Secretary or of the Intervenor before the Circuit Court urge that the phrase meant something other than first in point of time. During oral argument in response to a question from the Bench, counsel for the Secretary replied that the Secretary had defined the statutory phrase as meaning first in point of time. In deciding the issue on a point not invoked by the Department, the Court of Appeals apparently violated the rule of *Securities & Exchange Comm. v. Chenery Corp.*, 332 U. S. 194, 196, that a reviewing court must judge the propriety of the administrative determination solely on the grounds invoked by the agency.

In 1936, the Secretary of the Interior issued "Regulations Under Sections 13, 14, 17 and 28 of the General Leasing Act of February 25, 1920, as amended by the Act of August 31, 1935, "Circular No. 1386, 55 I. D. 502 at page 506. Sec. 12 of such regulations state:

> "Should more than one application for lease of the same lands be filed, the applications will be considered in the order filed and a lease granted to the qualified applicant *first in point of time in filing application.*" (Emphasis added.)

This interpretation has been the same through the years. Indicative of the consistent interpretation are the often cited decision by the Secretary in *Reay v. Lackie*, 60 I. D. 29 and the opinion by the Associate Solicitor on Simultaneous Filings, 64 I.D. 124 which are set forth *infra*, Appendix, pages 24, 27.

There are numerous other decisions to this same effect and none to the contrary, for instance: *R. S. Proics*, 66 I. D. 20, 22, (1959); *Warwick M. Downing*, 60 I. D. 433-(1950); *V. G. Morgan*, et al, 59 I. D. 400 (1947); *Malcolm C. Petrie*, 66 I. D. 289, 291, (1959); *United Manufacturing Co.*, 65 I. D. 106, 110 (1958); *Denver R. Williams*, 67 I. D. 315 (1960); *Harold Ladd Price*, 67 I. D. 428, 429 (1960). Others are *Signal Oil & Gas Co., Miller*, Decision of the Secretary of July 31, 1961, A-28626 wherein the Secretary stated that "the precise time of filing of an oil and gas offer is important because Sec. 17 provides, . . . the person first making application . . . shall be entitled to a lease . . . " The language has been referred to as "plain language," "a plain statutory mandate" on numerous times, as for instance, in *The Texas Co., Et Al*, 61 I. D. 367, 371; *Bettie H. Reid Et Al*, 61 I. D. 1, 3 (overruled on other grounds); *Transco Gas & Oil Corp., Et Al*, 61 I. D. 85, 88.

J. Ruel Armstrong, then Solicitor of the Department, in an article entitled "Leases and Leasing Practices" reported in the *First Annual Rocky Mountain Law Institute*, 1955, at page 49, stated as to non-competitive leases: "they are granted to the applicant on the basis of first in time first in right." Other articles expressing the same concept by distinguished members of the Bar and the Industry appear in the *Fourth Annual Rocky Mountain Mineral Law Institute*, p. 166; *Second Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation*, p. 331; *The Notation Rule-Doctrine of Sovereign Impunity of the Department of the Interior*, 7 *Utah Law Review*, 1960-1961, at p. 173, wherein Professor Schmid commented on the instant regulation 43 C.F.R. 192.43 as an attempt to change "first qualified applicant" to "first selected by chance qualified applicant," and at page

At no time has the Secretary expressed any doubt as to the clarity or plain meaning of the statutory preference right. The Secretary in his Brief and the Court of Appeals in its opinion, at footnote 8, implied that drawings to determine priority have been approved, citing *McKay v. Wahlenmaier*, 226 F. 2d 35. This petitioner carefully pointed out to the Court that in the *McKay* case, the question was whether an applicant had participated in an unfair scheme to increase his chances in a drawing. The contesting parties had both participated in the drawing and the question of whether the drawing violated Sec. 17 of the Act was not raised as an issue and was not ruled upon. Frequently, in the past, as pointed out in the Statement of the Case of this Petition, page 6, a number of applications have been filed at precisely the same time, and a drawing has been used to resolve the tie created by the applicants. But this is entirely different from *192.43* which by design and purpose creates a tie by a 5-day filing period with all applications viewed as filed on the fifth day regardless of when filed. The scheme is to produce a tie and a drawing to determine first place.

Most of all the court decisions which have construed the statutory language have been of the District of Columbia because this is where the Secretary of the Interior may be found for service. However, in *Call v. Richfield Oil Corporation*, 101 F. Supp. 972 (D. C., S.D., Calif.) at page 974, the Court stated:

> "From the very beginning this government has followed a consistent policy relative to its public lands. Regardless of the phase of endeavor, the policy has always been the same. It can be stated thus: 'The first comer (or the first locator) obtains the prior right . . .'"

and at page 975:

> "It is not strange, therefore, when Congress came to write a new law concerning oil and gas leases on

182 as a "step" in the Department's piecemeal repeal of Sec. 17 of the Act; at p. 194, refers to the statutory language as "clear, simple, unequivocable" and that Congress did not mean such to be changed to a "qualified applicant selected by lot after delay and advertisement."

> government land that it extended into that field of law the same theories which had been used in other fields of law, that is, give to the one who filed first a prior right, good as against subsequent applications."

and again at page 975:

> "The Secretary of the Interior recognized this doctrine when (in the case of Russell Hunter Reay vs. Gertrude H. Lackie . . .) he stated 'Sec. 17 thus placed on the Bureau a statutory duty to honor the preference thus accorded to the first applicant for a non-competitive oil and gas lease . . . '"

In *Witbeck v. Hardeman*, 51 F. 2d 450, 451, aff'd 286 U. S. 444, the Court found that the Secretary of the Interior must observe the statutory preference right in issuing a permit to prospect for oil and gas under the Mineral Leasing Act of 1920.

This is the first time that the 1960 regulation 43 C.F.R. 192.43 has been presented for review. However, the Court below in many other decisions has commented on the Sec. 17 statutory preference right and has never heretofore indicated any doubt as to its meaning and clarity. In *Seaton v. The Texas Company*, 256 F. 2d 718, the Court recognized the priority earned by the applicant Dorough for having filed first in point of time, stating at p. 724 that "the statutory scheme for leasing to the first qualified applicant we think cannot be abandoned by according to the Secretary an excessive latitude . . . "; and in *Barash v. Seaton*, 256 F. 2d 714, the Court found Barash entitled to a lease because he was the qualified person first to file in point of time. In *McKenna v. Seaton*, 259 F. 2d 780 (Cert. denied), the Court below at page 781 arrived at a conclusion which seems to be completely contrary to the decision sought to be reviewed:

> "DeArmas filed his application April 2, 1951. McKenna filed his August 17, 1954. DeArmas accordingly was *first in time* by more than three years. If he was qualified as well he was entitled to the lease in pref-

> erence to McKenna. This is so because the lease to be issued was of the non-competitive character . . . In this situation the governing statute provides that the lease shall go to 'the person first making application for the lease who is qualified to hold a lease.' Section 17 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 443 as amended . . . . " (Emphasis added)

If the Court below is correct in its conclusion that the statutory language is not definite and its meaning is subject to or may be governed by, or is dependent upon the fluctuating exigencies of administrative needs, then we are faced with the proposition that there may have been a delegation by Congress without a proper standard. Thus the constitutionality of the Act is made subject to doubt and question. The petitioner's position, however, resolves this question fairly and favorably because legislative history, long practice of the Department, and consistent interpretation and precedent confirm the meaning of the language as being what it plainly says, first in point of time.

In short, the matter sought to be reviewed represents the first and only time that any doubt has been expressed as to the meaning or clarity of the statutory preference right. The conclusion reached by the Court below is contrary to all precedent and practice, even contrary to its previous conclusions. Thus, this matter represents a substantial question of Federal Law which should be resolved by this Court.

3. The scheme of leasing devised by regulation 43 C.F.R. 192.43 is contrary to our national policy against lotteries and results in the perversion of public and private honesty. Although this point was raised by the petitioner, the Court below did not discuss it. All the elements of a lottery are present, namely, a *prize* (a lease to the person whose application is first drawn from the wheel or the cage), *consideration* ($10.00 filing fee for each application included in the drawing which is not returnable in any event as well as the increased likelihood of leasing the lands by an ever-increasing participation in the lotteries through publicity and a consequent increase in the

receipt of $10.00 filing fees;[1] *chance* (each offer represents a chance to win with the winner determined by lot with no skill involved), *Horner v. U. S.*, 147 U. S. 449. In one Land Office in July of 1961, over 10,000 offers were filed and over $100,000 collected in filing fees (Jt. App. 42). Information as to the monthly drawings and solicitations to handle the participation therein for a fee or an interest in the lease if lucky, are widely circulated over the nation in mail order solicitations, newspapers (Jt. App. 87, 88, 89, 90, 91, 92). Anyone and everyone, including Federal employees,[2] butcher, baker, and candlestick maker, are induced to participate on the premise of easy riches at $10.00 an application. The system with its achieved end of thousands of speculating participants, most of whom are interested in a quick sale rather than exploration, frustrates and has no real relationship to the basic policy of the Act which is "To promote the mining . . . of oil, gas . . . " The system procures the formation of fraudulent combines to increase the chances of winning and opens the door to all the evils of gambling. Typical of a number of recent sensationalist newspaper and magazine articles commenting on the national lottery is the one which appeared in the *American Mercury*, April 1962, *infra*, Appendix at p. 31.

---

[1] The affidavit by Harold R. Hochmuth, Associate Director of the Bureau of Land Management (Jt. App. p. 42) speaks of the "great assurance" in filing resulting from the new plan. The Secretary admitted in his Brief below that one of the purposes of the regulation is to cause "fuller public participation." An analogy may be made to "Bank Night" schemes where consideration is present because "As a result of this scheme, large numbers of patrons are drawn to the theatre on 'Bank Night' in the hope of gaining the prize money and many additional admission tickets are sold which otherwise would not be sold." *State v. Jones*, 44 N.M. 623, 625.

[2] In *B. F. Sandoval, Jr., Golden*, decision of Director of Bureau of Land Management, Feb. 15, 1963, NM 091480, the Director canceled a lease issued to Sandoval, a Post Office employee. The lease had been issued to Sandoval who drew first in a drawing held pursuant to 43 C.F.R. 192.43, but the Director found that the promoter who induced the employee to participate in the federal drawing was an agent who failed to disclose required information. Significantly, the evidence showed that the only purpose of Sandoval was to effect a quick sale, with payment of 10% commission to the promoter, that he knew nothing of the oil and gas business and relied on the promoter to select a good tract of land.

A legitimate oil and gas operator who may be desirous of development and exploration after spending thousands of dollars in preliminary analysis of a "wildcat" tract of land, finds that he cannot "first make application" but must draw against thousands of people whose main interest is purely a prospect of riches by a quick sale of the lease.

It is well known that the Department is conducting intensive investigations of fraudulent practices which have defeated the honesty of the drawings. In a hope to curb these practices of "collusive filings . . . to obtain a greater probability of success," the Secretary has just issued new regulations under date of March 7, 1963, F. R. Doc. 63-2462, Federal Register of March 8, 1963, p. 2283.

The Department's position (Jt. App. 39-42) is that the new regulation was made necessary because of practical problems encountered in the administration of the Act, that is, possible collusive activities on the part of its employees, breaches of peace, damage to the records. Law has its remedies for such undesirable activities, but such activities, no matter how onerous and troublesome, are not justification for rewriting the statute. All the Department need do is present its problems to Congress for consideration.*

Thus, the question here also concerns our national policy against all schemes for the distribution of prizes by chance. *Horner v. U. S., supra.* The various states as well have laws against lotteries. The question is particularly significant because officers of the United States have instigated the scheme and conduct its operation.

---

* In the event the petition is granted, the petitioner reserves the right to make additional arguments, that the regulation creates a classification of non-competitive leases contrary to the statute, that is, non-competitive lands once leased are exclusively subject to the drawing procedure, but if the lands have never been leased, a lease will issue to the applicant who files first in point of time; that the problems mentioned by the Secretary which led to the new regulation have no real or substantial relationship to lands in expired leases, which lands are the type filed for by this petitioner.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a Writ of Certiorari should be sustained and a Writ issue. Substantial property rights are concerned, but the real concern here is the rule of law or the will of the administrator.

Thomas F. McKenna
McKenna & Sommer
302 East Palace Avenue
Santa Fe, New Mexico

and

James T. McNelis

412 Fifth Street N.W.
Washington 1, D. C.
Attorneys for Petitioner

April 1963.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,101

THOR-WESTCLIFFE DEVELOPMENT, INC., APPELLANT

v.

STEWART L. UDALL, Secretary of the Interior, and KARL S. LANDSTROM, Director, Bureau of Land Management,

APPELLEES

R. E. BOYLE, Intervenor-Defendant, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided January 24, 1963

Mr. Thomas F. McKenna, with whom *Mr. James T. McNelis* was on the brief, for appellant. *Mr. Joseph A. Sommer* also entered an appearance for appellant.

Mr. A. Donald Mileur, Attorney, Department of Justice, with whom *Assistant Attorney General Clark* and *Messrs. Roger P. Marquis* and *Ralph S. Boyd*, Attorneys, Department of Justice, were on the brief, for appellees Udall and Landstrom.

Mr. Lewis E. Hoffman, with whom *Mr. Leon BenEzra* was on the brief, for appellee Boyle.

Before WASHINGTON, *Circuit Judge*, BELL, *Circuit Judge for the Fourth Circuit*,* and WRIGHT, *Circuit Judge*.

WRIGHT, *Circuit Judge*: Section 17 of the Mineral Leasing Act of 1920[1] provides that public lands "not within any known geological structure of a producing oil or gas field" shall be leased "to the person first making application" at not less than fifty cents per acre. In an effort to eliminate the chaos which sometimes resulted from competition among applicants to be literally the "person first making application" for leases having speculative value far in excess of leasing costs, the Secretary of the Interior promulgated a regulation[2] providing for simultaneous filing and a public drawing in the event of multiple applications. Appellant attacks this regulation as unresponsive to the statutory command that the lease be given to the "person first making application." The District Court granted summary judgment in favor of the Secretary. We affirm.

Experience in the administration of the Act has demonstrated that land subject to leasing after expiration or cancellation of a prior lease often has significant speculative value[4] in spite of the fact that it is not actually "within any known geological structure of a producing oil or gas field." In order "to assure public notice and fuller public participation in the process of reissuing relinquished leases,"[5] Regulation 192.43 provides for the posting of descriptions of such expired lease land in each Interior Department land office on the third Mon-

---

* Sitting by designation pursuant to Sec 291(a), Title 28, U. S. Code.

[1] 41 Stat. 443, as amended, 30 U.S.C. § 226.

[2] 43 C.F.R. § 192.43.

[3] Appellant also argues that when land has been once offered for leasing under the Act, the Secretary may not "withdraw" the land pending re-lease. This contention has been rejected by this court on prior occasions. *Wright v. Paine*, 110 U.S.App.D.C. 100, 289 F.2d 766 (1961); *Haley v. Seaton*, 108 U.S.App.D.C. 257, 281 F.2d 620 (1960).

[4] Geological information acquired during a prior lease as to the proximity of a known structure often greatly enhances the value of the property for mineral purposes.

[5] *Miller v. Udall*, —— U.S.App.D.C. ——, 307 F.2d 676, 677-678, n. 1 (1962).

day of each month, together with "a notice stating that the lands in such leases are subject to the simultaneous filings of lease offers from the time of such posting until 10:00 o'clock a. m. on the said fifth working day thereafter." If at 10:00 a. m. on the fifth day more than one offer has been received to lease the same acreage, the priorities are determined by lot.

Prior leases on the lands in suit expired by operation of law on June 30, 1961. Appellant filed its applications for leases on July 3, 1961, the next business day. On July 17, 1961, the lands were posted under the procedure described above and applications for leases were accepted until 10:00 a. m. on the "fifth working day thereafter." Appellant filed no applications during this interval. A drawing was held among those applications filed during this period and intervenor Boyle was the winner. Appellant's applications of July 3, 1961, were rejected as untimely. Having exhausted its remedies within the Department, appellant brought suit for a judgment declaring Regulation 192.43 invalid and granting the leases to it.

Appellant, ignoring Mr. Justice Frankfurter's famous dictum,[*] stands firmly on the literal language of the statute. It was the "person first making application" after the prior leases expired, it argues, and consequently the Secretary must comply with the statutory mandate. The Secretary relies upon the regulation, which he justifies as necessary to end the mad scrambles, breaches of the peace, damage to tract books, and corruption of land office employees as applicants competed to be the "person first making application." Appellant does not contest the existence of these problems with respect to cancellation or other premature termination of a lease, but asserts (1) that these problems do not exist where leases terminate

---

[*] "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U. S. 424, 431 (dissenting opinion) (1943).

[7] For a description of some of the devices used to obtain advantages in the race to be first, see *Miller v. Udall*, supra Note 5; *Signal Oil and Gas Company*, Interior Dept. No. A-28626 (1961); *Margaret A. Andrews, et al.*, 64 I.D. 9 (1957).

by expiration, (2) that other methods of meeting these problems are available, and (3) that in any event this regulation on its face conflicts with the statutory requirement and is therefore invalid.

The Secretary has full authority under the Act "to prescribe necessary and proper rules and regulations"[1] to accomplish its purposes. Stripped to its essence, the question presented here simply is: does Regulation 192.43 comport with the Secretary's statutory authority? It is not for us, nor for appellant, to suggest a method for solving the problems which have arisen in the administration of the Mineral Leasing Act. Congress has consigned that function to the Secretary. Our inquiry ends when we determine whether or not the method adopted by the Secretary is "unreasonable and plainly inconsistent" with the statute, having in mind that regulations "constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons." *Commissioner v. South Texas Co.*, 333 U. S. 496, 501 (1948).

In administering the Mineral Leasing Act, the Secretary exercises a discretionary, rather than a ministerial, function. Compare *Udall v. States of Wisconsin, Colorado and Minne-*

---

[1] A similar predecessor regulation and the present regulation as applied to the re-lease of land on which leases have been cancelled or relinquished have been construed in other cases by this court, in none of which has any doubt been expressed as to their validity. In *McKay v. Wahlenmaier*, 96 U.S.App.D.C. 313, 226 F.2d 35 (1955), this court, while specifically noting that Section 17 requires that the lease be issued to the "person first making application," passed upon the qualifications of a leaseholder chosen by lot. In *Miller v. Udall*, supra Note 5, 307 F.2d at 677, n. 1, this court recognized the "vice" of literal application of the first in time rule and noted with approval the provisions for "public notice and fuller public participation" found in Regulation 192.43. Appellant attempts to distinguish these cases on the ground that the prior leases there involved terminated prematurely, whereas the prior leases here expired routinely. In so doing, it challenges the discretion of the Secretary, rather than the procedure provided by the regulation. We find the Secretary's action in extending the regulation to include expired leases neither arbitrary nor capricious. See *Hall v. Payne*, 254 U. S. 343, 347 (1920); *North Central Airlines, Inc. v. Civil Aeronautics Bd.*, 105 U.S.App.D.C. 207, 265 F.2d 581 (1959).

[2] 41 Stat. 450, 30 U.S.C. § 189.

sota, —— U.S.App.D.C. ——, 306 F.2d 790 (1962). The provisions of the Act "plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion." *United States v. Wilbur*, 283 U. S. 414, 418 (1931). This, of course, does not mean that the Secretary is permitted to grant a lease to one other than "the person first making application." It does mean that the Secretary is to determine who that first person is. Hence the provision in the Act authorizing the promulgation of regulations. 41 Stat. 450, 30 U.S.C. § 189. It is likewise clear that the language "person first making application" is not so definite, particularly when prior experience with its application is considered, as to render an interpretative or implementing regulation inappropriate. Compare *Helvering v. Reynolds Co.*, 306 U. S. 110, 114 (1939); *Morrissey v. Commissioner*, 296 U. S. 344, 354-355 (1935).

Having recognized the authority in the Secretary to promulgate a regulation implementing the statutory language "person first making application," we must decide whether Regulation 192.43 is consistent with the Act and a reasonable exercise of the Secretary's authority thereunder, or whether the regulation is "in the teeth of the unambiguous mandate of the statute, [is] contradictory of its plain terms, and amount[s] to an attempt to legislate." *Helvering v. Sabine Trans. Co.*, 318 U. S. 306, 311-312 (1943). We find, considering the language and purpose of the statute, as well as the experience of the Secretary in the implementation thereof, that the regulation is neither unreasonable nor inconsistent with the plain language of the Act.

Appellant does not argue that Regulation 192.43 unfairly favors some applicants for leases at the expense of others[9] or that the procedure provided therein is inconsistent with the legislative purpose to distribute these leases fairly with the opportunity for full participation by the interested public. Its

---

[9] Compare *Barush v. Seaton*, 103 U.S.App.D.C. 159, 256 F.2d 714 (1958); *McKay v. Wahlenmaier*, supra Note 8.

argument seems to be that, because of practical difficulties attendant its administration, the Secretary has rewritten the statute.

It must be owned that the procedure outlined in Regulation 192.43, on superficial examination, bears little resemblance to the "person first making application" language of the statute. But Congress could hardly have supposed that granting $.50 per acre mineral leases can be accomplished as simply as the statutory language seems to indicate. The history of the administration of the statute furnishes compelling proof, familiar to the membership of Congress, that the human animal has not changed, that when you determine to give something away, you are going to draw a crowd. It is the Secretary's job to manage the crowd while complying with the requirement of the Act. Regulation 192.43 is the Secretary's effort in this direction. We cannot say that it is an impermissible implementation of the statutory purpose.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,101

THOR-WESTCLIFFE DEVELOPMENT, INC., APPELLANT,

v.

STEWART L. UDALL, Secretary of the Interior, and KARL S. LANDSTROM, Director, Bureau of Land Management,

APPELLEES,

R. E. BOYLE, Intervenor-Defendant Appellee

September Term, 1962 — Civil 2406-61

Appeal from the United States District Court for the District of Columbia.

Before: Washington, Circuit Judge, and Bell, Circuit Judge for the Fourth Circuit, and Wright, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appellee R. E. Boyle recover from appellant the taxable cost of printing his brief on this appeal, and have execution therefor.

For Circuit Judge Wright.

Dated: January 24, 1963.

RUSSELL HUNTER REAY v. GERTRUDE H. LACKIE

DECIDED August 12, 1947

A-24670

Noncompetitive Oil and Gas Lease — Cancellation of Lease Erroneously Issued in Violation of Preference Right of Another Applicant

A noncompetitive oil and gas lease which was issued to a junior applicant, the prior application having been inadvertently overlooked, will be canceled in order to honor the preference right to a lease which the prior applicant has under section 17 of the Mineral Leasing Act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On August 1 , 1941, Gertrude H. Lackie filed an application for an oil and gas,[1] Los Angeles 054899, covering lot 4, sec. 31, T. 5 N., R. 16 W., S. B. M., California. This application was suspended and held in the district land office pending the adjudication of a conflict with a prior oil and gas lease application, Los Angeles 054113, which was later rejected. While the Lackie application was suspended, Russell Hunter Reay filed a similar application covering lot 4 on November 3, 1943, Los Angeles 055644. Since the district land office overlooked the existing conflict with the Lackie application, a lease was eventually issued to Reay, dated December 1, 1945. After the rejection of application, Los Angeles 054113, it was discovered that the Reay lease had been issued without consideration of the preference right granted by the statute to Lackie as the prior noncompetitive oil and gas applicant. By decisions of January 16 and April 21, 1947, the Bureau of Land Management offered a lease to Lackie and held Reay's lease for cancellation. Lackie has executed the lease forms. Reay has appealed (A-24670). He states that he paid rental on the lease;

---

[1] Under section 17 of the Mineral Leasing Act (41 Stat. 437, 443, as amended, 43 Stat. 1007; 46 Stat. 1523; 49 Stat. 676; act of August 8, 1946, 60 Stat. 950, 951; 30 U.S.C. sec. 226).

that he relied on the Government tract books; that the lease was issued to him without any fault on his part and therefore that it should not now be canceled.

At the time these applications were filed, section 17 of the Mineral Leasing Act granted a preference right to "the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field". This preference right has been continued in section 17, as amended by the act of August 8, 1946 (60 Stat. 950, 951), which states:

> * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *"

Section 17 thus placed upon the Bureau a statutory duty to honor the preference thus accorded to the first applicant for a noncompetitive oil and gas lease on lands not within a geologic structure of a producing oil and gas field. The Bureau was under a duty to adjudicate all pending applications in the light of that statutory mandate. Lackie's application was filed more than 2 years prior to Reay's application, and thus she had a statutory preference right under the statute.

The Department regrets that Lackie's application was overlooked by the district land office and that the Reay lease was thus erroneously issued.[2] Nevertheless, the fact remains that the issuance of the Reay lease was a violation, even though unintentional, of Lackie's statutory preference right since her application was not accorded the preference to which she was entitled under the statute. The issuance of the Reay lease, therefore, was unauthorized to the extent that it violat-

---

[2] It appears that the existence of the Lackie application was noted on the tract books of the district land office but not on the tract books of the Bureau of Land Management in Washington, where the adjudication of the Reay lease application took place. Reay, however, was adequately placed on notice of the Lackie application by the notation thereof on the district land offfice tract books.

ed the statutory preference which Lackie had. It appears that Lackie is a qualified applicant for the lease of the entire lot 4. A governmental officer may not bind the Government by any act beyond his authority.[1] Accordingly, there is no alternative except to cancel Reay's lease in order to honor the statutory preference which Lackie plainly has.[2]

The decision of the Bureau of Land Management is affirmed.

OSCAR L. CHAPMAN,
Under Secretary

---

[1] *Pine River Logging Co. v. United States*, 186 U. S. 279, 291 (1902); *United States v. City and County of San Francisco*, 310 U. S. 16, 31, 32 (1940); *Jeems Bayou Fishing & Hunting Club v. United States*, 260 U. S. 561, 564 (1923); *Lee Wilson & Co. v. United States*, 245 U. S. 24 (1917); *Utah Power & Light Co. v. United States*, 243 U. S. 389, 408, 409 (1917); *Filor v. United States*, 9 Wall. (76 U. S.) 45, 49 (1869).

[2] *Patterson v. Thorn*, 60 I.D. 11 (1947).

OIL AND GAS LEASES — SIMULTANEOUS FILINGS

Applications and Entries: Priority—Regulations: Generally

Where the regulations define "filed simultaneously" with respect to conflicting applications or offers as "filed at the same time", offfers filed 1 or 10 seconds apart are not simultaneous filings, but the first offer received is filed prior to the next one.

Oil and Gas Leases: First Qualified Applicant

The provisions of section 17 of the Mineral Leasing Act as amended, giving priority to the first qualified applicant, coupled with the definition of simultaneous filings contained in the regulations and with the long-continued practice of the Department, requires that an oil and gas lease offer received over the counter 1 second prior to a succeeding offer for the same land be recognized as prior to such succeeding offer, opportunity having been given both parties to file under a rule that would have made the filing of both offers simultaneous at least in the absence of any equitable reason for treating both as simultaneous.

M-36435 May 9, 1957

TO THE DIRECTOR, BUREAU OF LAND MANAGEMENT

In a memorandum of April 23, from the Regional Solicitor, Denver Region, the question is presented whether certain oil and gas lease offers filed by different persons for the same land at intervals from 1 second to 10 seconds were simultaneously filed.

The facts with respect to the relative time of filing are as follows:

On March 15, 1957, 17 oil and gas offers were received at and after 10:01 a. m. in the public room of the Land Office for filing within the 1-minute interval. Five offers, C-017021, C-017022, C-017023, C-017024 and C-017025 were filed first by a representative of certain offerors. Approximately 1 second later 6 offers, C-017026, C-017027, C-017028, C-017029, C-017030

and C-017031 were filed by another offeror. Approximately 1 second later 5 offers, C-017032, C-017033, C-017034, C-017035 and C-017036 were filed by a representative of another group of offerors. Offer C-017037 was then filed by the same offeror who filed the above referred 6 offers. The Land Office personnel noted the hour and minute when the above offers were received and the offers were later stamped as having been received by the Land Office at 10:01 a. m. The offers filed within the four above sequences were within the one-minute interval; in some instances cover the same lands.

On March 18, at exactly 10:01 a. m. a representative of an offeror filed offer C-017055 and approximately a second later another offeror filed offer C-017056 covering the same lands. Both offers were stamped as having been received at 10:01 a. m. It is noted that two clerks were waiting on the counter but since five persons filed offers within less than one minute it is possible that each clerk received offers which conflict with each other.

It appears that the Land Office at Denver, Colorado, where these offers were filed is opened to the public at 10:00 a. m., Mondays through Fridays, that a basket is conveniently placed near the entrance into which lease offers or applications of any type handled by that office may be placed by persons waiting at the door for the office to open. Any offer or application so placed at the time the office is opened (or as soon as it can be approached for that purpose after the office is opened in case a large number of applicants or offerors are waiting for the opening) are considered as filed at 10:00 a. m.

For the purpose of this opinion, it is assumed that the procedure for filing promptly at 10:00 a. m., is known to all applicants or offerors or that sufficient notice of it is brought to their attention in some adequate manner. If neither is true and the offerors involved in this case were waiting in line and filed their offers at the counter at the earliest moment possible after the office doors were opened, it would appear that the offers would have to be deemed to have been simultaneously filed. *Barbara M. Smoot*, 61 I.D. 337 (1954). It is also assumed for the same purpose that the offerors here involved for

some reason, whether to examine the records or other, were not ready or willing to file their offers by depositing them in the basket available for that purpose. With these assumptions it would be immaterial whether the conflicting offers were filed between 10:01 and 10:02 a. m. or within any single minute thereafter during the day prior to the closing of the office at whatever time that occurred.

> * * * When no order of restoration or notice of opening is involved, the applications will be treated as having been filed simultaneously if they are received by a land office (or, if there is no such office in the State, by the Washington Office of the Bureau of Land Management), over the counter at the same time, or are received in the same mail.

It will be noted that applications "received by a land office * * * over the counter at the same time" will be considered as simultaneously filed. Thus, the regulation defines "filed simultaneously" as filed at the same time in specific reference to applications "received" over the counter. This is giving the word "simultaneously" the strictest definition. It has been said that the word "simultaneously", in strict sense, means at precisely the same instant, but, in broader sense, at substantially the same time. *Thomas v. Anderson*, 215 P.2d 478, 481 (Calif., 1950); and see *In re Searl's Estate*, 186 P.2d 913, 918 (Wash., 1947); 173 A.L.R. 1247; *Cummings v. Kendall*, 93 P.2d 633, 635 (Calif., 1939); and *State v. Columbus, Delaware and Marion Electric Co.*, 133 N.E. 487, 788 (Ohio, 1921). Apart from this definition, however, the Department long ago recognized the necessity for using a strict rule with respect to applications, the acceptance of which would confer a preference right under the law. Thus, it has specifically held that "where a few seconds intervened between two applications to contest an entry, the right of precedence should be awarded to the first actually received, and that 'it matters now how short may have been the interval between the presentation of the two contests, the one actually received before the other is entitled to precedence'." *Jacobs v. Champlin et al.*, 4 L.D. 318, 319 (1886), quoting from and following *Benschoter v. Williams*, 3 L.D. 419 (1885).

The same rule was stated in 1916 as to applications generally and in *Bumpers v. Holloway*, 48 L.D. 269, 270 (1921), the Department said that that rule had been correctly applied. The language was "Where two applicants for the same land appear together at the local office, the application first handed to the officer or clerk waiting on the counter is entitled to priority".

The Mineral Leasing Act, as amended, provides in cases such as this that "the person first making application for the lease who is qualified to hold a lease under the act shall be entitled to a lease * * *". Act of August 8, 1946 (60 Stat. 951; 30 U.S.C. sec. 226). That provision is mandatory upon the Department. *Bettie H. Reid, Lucille H. Pipkin*, 61 I.D. 1, 3 (1952) and *C. I. Hequer*, 62 I.D. 77 (1955). It may be noted that the *Jacobs* and *Benschoter* cases, *supra*, involved an act which gave a preference right of entry to one who procured the cancellation of an entry by contesting it and does not directly spell out the respective rights of two proposed contestants of such an entry so as to make such rights mandatory as a matter of law. Act of May 14, 1880 (21 Stat. 140; 43 U.S.C. sec. 185). While the law there obviously is mandatory as applied to the first applicant, there might be some room for administrative discretion in determining in a close case the question of priority. But where (1) the regulation is as clear as it is here and (2) the law is, in terms, mandatory and (3) opportunity is afforded all who enter the office at approximately the time of its opening to file simultaneously in a receptacle maintained for that purpose, there is no room for administrative discretion with respect to those who choose to file over the counter. The *Bumpers* case is consistent with the present regulation as to applications and offers generally. The *Smoot* case deals with a special situation, which, on the facts assumed, is not present here.

In summary: The cases indicate that the rule now clearly stated in the regulations has been applied and followed consistently for many years. The reason for the rule is essentially fair as applied to all types of applications and offers. Under the regulation where one perhon who files one second in advance of another the two filings do not come within the defi-

nition of applications or offers filed simultaneously. This being so, there is a duty, mandatory under the law, to issue a lease to the person first filing an offer for the land no matter how small the interval of time between the two filings.

CHARLES M. SOLLER,

Associate Solicitor

Approved: May 16, 1957

Edmund T. Fritz,

Deputy Solicitor

NATIONAL OIL-LEASE LOTTERIES

(By L. N. Hagood, From the American Mercury, April, 1962)

Even though Congress has never given legal sanction to national lotteries, the federal government conducts lottery operations in the Western states through its Bureau of Land Management.

On the third Monday of each month, in the several U. S. Land Offices, the numbers game begins and the wheels of fortune roll in the booming national oil-lease lotteries. The big ones are held in the Land Offices at Los Angeles, Sacramento, Salt Lake City, Phoenix, Santa Fe, Denver, Cheyenne and Billings. "Uncle Sugar" is raffling off his public domain oil leases at ten bucks a chance.

* * * Each lease offer and $10 lottery fee is numbered and a matching numbered card placed into the revolving "squirrel cage". Public drawings are thus held in each Land Office and all numbers drawn.

The operation is so huge and complicated that the clerks and officials must adjourn to their private offices for ten days or more and work at high speed to match up the drawings, land descriptions and numbers before they can determine the many winners, compile public lists and make ready for next month's lottery. During 1961, there were 73,148 (simultaneous)

lottery offers filed in the Bureau of Land Management Office at Santa Fe, on which the total amount of rental tenders returned to losers was in the sum of $28,000,000.

There is opportunity for throwing a winning number of a valuable lease to a favored gambler, who could well afford to return the favor. The temptation to overworked Land Office people may be great. Generally, however, the drawings are considered honest as to the Land Office handling, but the public cannot depend on it. Owing to the unusual nature of the lotteries, it is generally known that Uncle Sam is not only generous with his valuable oil leases, but also allegedly *winks at questionable practices of some of his thousands of customers.*

In ordinary lottery, a gambler may buy as many chances or tickets as he wishes. In "Uncle Sugar's" oil-lease lotteries, the law allows only one chance to each applicant on each lease in the drawing. Multiple chances on the same lease for the same person are illegal as well as inequitable.

Nevertheless, enterprising lease brokers, promoters, speculators and others are accused of such illegal practices by the use of secret "dummy" lease applicants for their benefit. The land office people say they are overworked in handling the monthly deluge without trying to be G-Men or doing the police work necessary to catch the culprits.

The Santa Fe *New Mexican* recently published a story with the following headline: CHEATING GOES ON IN LAND BIDDING; BUT B.L.M. HELPLESS TO ACT. The next week the headline read: HARD TO PROVE VIOLATIONS; 10 PERCENTERS ADMIT ACTIVITIES.

* * * To circumvent the law, various secret schemes and methods for dummy lottery filings are used. Promoting individuals to sign sheaves of blank lease offers and writing their own checks is perhaps the most common one, and bank accounts set up in dummy names is also probably not unusual.

In a resolution of October 31, 1961, the Rocky Mountain Oil and Gas Association opposed competitive bidding to correct

these abuses which it admitted have occurred, but could offer no better solution.

Banks in such towns as Casper, Wyoming, which calls itself "The Oil Capital of the Rockies", as well as other Western banks from Los Angeles to Wichita, do a thriving business in drafts and cashier's checks, and millions of dollars pour into the Land Offices from oil towns such as Dallas, Houston, Midland and Tulsa. Bankers also make loans to leasemen and brokers for these rental tenders because they are returned by the Land Offices in less than 30 days, unless they cover a winner, which is good collateral.

Until a few years ago, only experienced professionals, oil operators, landmen and lease brokers engaged extensively in public land oil leasing and trading. Now movie actors, gamblers, racketeers, butchers, bakers and candlestick makers, from all over the United States are avidly putting up their ante to draw in these raffles. Honest professionals interested in geological prospects, exploration and development are being eliminated.

This was made possible by promoters and "lease-service" agencies, which have developed a large and lucrative business in each Land Office town. They airmail the posted drawing lists of land descriptions to their customers throughout the nation who, in turn, mail back lease applications for the drawings. Agents, touts and attorneys-in-fact also prepare and file for their clients, ante the drawing fees, tender the advance rentals, and sell their advice and geological opinions. It is all similar to race track, sports, wire service, pool hall, bookies and other gambling facilities and practices and basically operated on the same principle. Uncle Sam's lotteries have "protection" even though cheating and fraud may be thinly disguised. It is reported that tax-evasion, racketeer, labor union, movie actor and "sucker" money is in the game.

As in all rigged games, there is a system among smart operators. They are said to be concentrating upon the most valuable leases, filing hundreds of offers and antes for the same valuable property by as many of their secret "dummies" for

their benefit. Others are more careful and induce their dummies to write their own checks and applications on promise of a percentage. The dummy or captive gambler in the lottery is not likely to inform on his secret principal or promoter, because he is equally guilty and subject to prosecution, if indicted, as *particeps criminis*. The law requires his oath in his lease application that he is the "sole party in interest".

Office Supreme Court, U.S
FILED
MAY 17 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1035

THOR-WESTCLIFFE DEVELOPMENT, INC.,
Petitioner,

v.

STEWART L. UDALL, Secretary of the Interior, et al.

and

R. E. BOYLE, INTERVENOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE INTERVENOR-RESPONDENT IN OPPOSITION

LEWIS E. HOFFMAN
711 - 14th Street, N.W.
Washington 5, D. C.

LEON BENEZRA
810 - 18th Street, N.W.
Washington 6, D. C.

Counsel for Intervenor-Respondent

MAY, 1963

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1, 2
Question Presented	2
Statutes and Regulations	2, 3
Statement	3-5
Argument	5-8
Conclusion	8

CITATIONS

CASES:

Haley v. Seaton, 281 F. 2d 620 (C.A.D.C.)	7
Knight v. *U.S. Land Association*, 142 U.S. 161, 178	5
United States v. Morehead, 243 U.S. 607, 613	5
United States v. *Wilbur*, 283 U.S. 414	7
Williams v. United States, 138 U.S. 514, 524	6

STATUTES & REGULATIONS:

Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*	
Sec. 17(a), 30 U.S.C. 266(a)	2, 7
Sec. 17(c), 30 U.S.C. 266(c)	2
Sec. 32, 30 U.S.C. 189	2, 6
43 C.F.R. 192.43	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1035

THOR-WESTCLIFFE DEVELOPMENT, INC.,
Petitioner,

v.

STEWART L. UDALL, Secretary of the Interior, et al.

and

R. E. BOYLE, INTERVENOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE INTERVENOR-RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 17-22) is reported at 314 F. 2d 257.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1963 (Pet. App. 23). The Petition for a

Writ of Certiorari was filed on April 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has violated Section 17 of the Mineral Leasing Act which requires the issuance of non-competitive oil and gas leases on public lands to "the person first making application who is qualified to hold a lease" by the issuance of his regulation, 43 C.F.R. 192.43 which governs the availability of such public lands for non-competitive leasing on which previous leases have expired and considers all lease offers filed within a prescribed 5 day period as simultaneously filed.

STATUTES AND REGULATIONS

Section 17(a) of the Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(a) provides:

> "All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary."

Section 17(c) of the Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(c) provides:

> "If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application, who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding."

Section 32 of the Mineral Leasing Act of 1920, 41 Stat. 450; 30 U.S.C. 189, provides:

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *."

43 C.F.R. 192.43, reads in pertinent part as follows:

> "(a) * * * All lands covered by leases which expire by operation of law at the end of their primary or extended terms shall * * * be subject to filing of new lease offers only in accordance with the provisions of this section * * *.
>
> "(b) On the third Monday of each month or the first working day thereafter if the land office is not officially open for business on the third Monday, the authorized Office of the Bureau of Land Management will post on the bulletin board in each land office a list * * * of lands in leases which expired * * * and which will become subject to leasing at 10 o'clock a.m. on the fifth working day thereafter together with a notice stating that the lands in such leases are subject to simultaneous filings of lease offers from the time of such posting until 10 o'clock a.m. on the said fifth working day thereafter.
>
> * * * *
>
> "(d) If more than one offer to lease all or any part of the acreage covered by an expired, cancelled, relinquished, or terminated lease is filed during the period provided for in paragraph (b) of this section, their priorities will be determined by a public drawing in accordance with sec. 295.8 of this chapter."

STATEMENT

Effective January 7, 1960 (24 F.R. 9346), the Secretary of the Interior amended Regulation 43 C.F.R. 192.43, the validity of which is challenged by petitioner. Under subsections (a) and (b) of this regulation, lands which were embraced in oil and gas leases which had expired do not again become available for leasing until a public notice of their availability is posted on the bulletin board of the land office having jurisdiction of the lands. Offers to lease such lands which are received by 10 o'clock a.m. of the fifth working day following such posting are deemed to have been filed simultaneously. Under subsection (d) of this regulation, if more than one offer is re-

ceived during the five day period, a public drawing is held in the land office in accordance with 43 C.F.R. sec. 295.8 to determine the priority between the conflicting applicants. On July 3, 1961, petitioner filed three applications for oil and gas leases (designated NM 0196014, Wyo. 0153852 and U 071153) covering lands in New Mexico, Wyoming and Utah on which previous leases had expired on June 30, 1961. Petitioner filed these applications prior to the posting in the land offices on July 17, 1961, of notices of the availability of such lands for leasing as provided in 43 C.F.R. 192.43.

Thereafter the managers of the land offices in Santa Fe, Cheyenne and Salt Lake City rejected petitioner's applications on the grounds that they were filed prematurely and not in accordance with the Department's regulations. On appeal, the Director of the Bureau by decision dated October 26, 1961, which decision was approved by Assistant Secretary Carver on the same date, affirmed the action of the managers. Petitioner filed suit in the United States District Court for the District of Columbia requesting that this regulation be declared invalid; that the lands in question be declared to have become available for leasing on July 3, 1961, the date petitioner filed his applications, and that petitioner be declared to be the first qualified applicant. R. E. Boyle, the Intervenor, is the successful applicant for the same lands embraced in petitioner's rejected application, N.M. 0196014, and under the regulation in question lease would issue to him but for the pendency of this litigation. On cross motions for summary judgment, the District Court dismissed petitioner's action with prejudice (Jt. App. 113-114)[1] On appeal, the Court of Appeals affirmed the decision of the District Court and upheld the validity of the Secretary's regulation on the grounds that it represented an imple-

[1] Jt. App. refers to the joint appendix printed in the Court of Appeals.

mentation of the statutory language "person first making application", was not inconsistent with the language of the Act and that it was a reasonable exercise of the Secretary's authority to cope effectively with the problems encountered in his administration of the Act.

ARGUMENT

The Secretary of the Interior as the head of the Land Department "is expressly charged with the duty of enforcing the public land laws by appropriate regulations * * *." *United States* v. *Morehead*, 243 U.S. 607, 613 (1917). In *Knight* v. *U.S. Land Association*, 142 U.S. 161, 178 (1891) the Supreme Court stated in part:

> "* * * respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to claimants and to preserve the rights of the people of the United States. * * * The mode in which the supervision shall be exercised in the absence of statutory directives may be prescribed by such rules and regulations as the Secretary may adopt."

The Secretary's regulation, whose validity is challenged by petitioner, was designed to meet specific operational problems in the local land offices which were seriously impairing the administration of the Department's oil and gas program. These problems were vividly described by the affidavit of Harold R. Hochmuth, Associate Director of the Bureau of Land Management filed in the District Court (Jt. App. pp. 39-42). This affidavit stated in part the following:

> "* * * It was felt that a procedure for the filing of simultaneous offers for such lands and the utilization of the drawing procedure provided for in the departmental regulations to determine priorities was vitally necessary to correct certain problems which had developed over a long period of time in connection with oil and gas leasing. These arose as the result of the desire of all lease applicants to be first in

> line at the land offices for the purpose of gaining priority rights in oil and gas lease offers. We believed that the simultaneous filing procedure would eliminate the then existing situations in which the lease brokers were daily cluttering the various land offices to examine the records for the notations of cancelled and relinquished leases in order to file for such lands * * *. In several of the land offices as the result of these mad scrambles every morning between the different examiners of the tract books, such records became considerably damaged. Upon information and belief, there were a number of breaches of the peace in the land offices as the result of such competitive activities between the so-called land locators. The rationale for the amendment of Section 192.43 was that it would abate the situations mentioned above * * *."

This Court has long recognized that the Secretary may fashion regulations to meet new and unexpected contingencies. Thus, in *Williams* v. *United States*, 138 U.S. 514, 524 (1891), this Court stated:

> "It is obvious, it is common knowledge that in the administration of such large and varied interests as are entrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise; and therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."

Moreover, Section 32 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 189) expressly provides that "* * * the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *."

Section 17(a) of the Mineral Leasing Act of 1920, as amended 74 Stat. 782, 30 U.S.C. 226(a), provides that public lands subject to disposition under the Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. Whether these lands are to be leased under the Act is discretionary with the Secretary. *United States* v. *Wilbur*, 283 U.S. 414; *Haley* v. *Seaton*, 281 F. 2d 620 (C.A.D.C.). However, having decided to lease lands which are not within a known geological structure, the Secretary is required by the Act to issue a non-competitive lease to "the person first making application, who is qualified to hold a lease under this Act."

In deciding this case the Court of Appeals rejected petitioner's assertion that the regulation is unresponsive to the statutory requirement that the lease be given to the "person first making application." The Court upheld the validity of the regulation which the Court recognized as designed "to assure public notice and fuller public participation" in the process of reissuing expired leases and "to end the mad scrambles, breaches of the peace, damage to tract books * * * as applicants compete to be the 'person first making application.'" The Court held, moreover, that the regulation was not inconsistent with the plain language of the statute; that it represented a permissable implementation of the statutory language "person first making application" and a reasonable exercise of the Secretary's authority to administer the Act.

The intervenor-respondent believes that the decisions of the courts below are correct. There is no question of Federal law in this case which warrants review by this Court, and there is no conflict here with any State law. Moreover, the decision of the court below does not conflict with any decision of this court nor with any deci-

sion of other Federal Circuit Courts. Consequently, there is no occasion for further review by this Court.

CONCLUSION

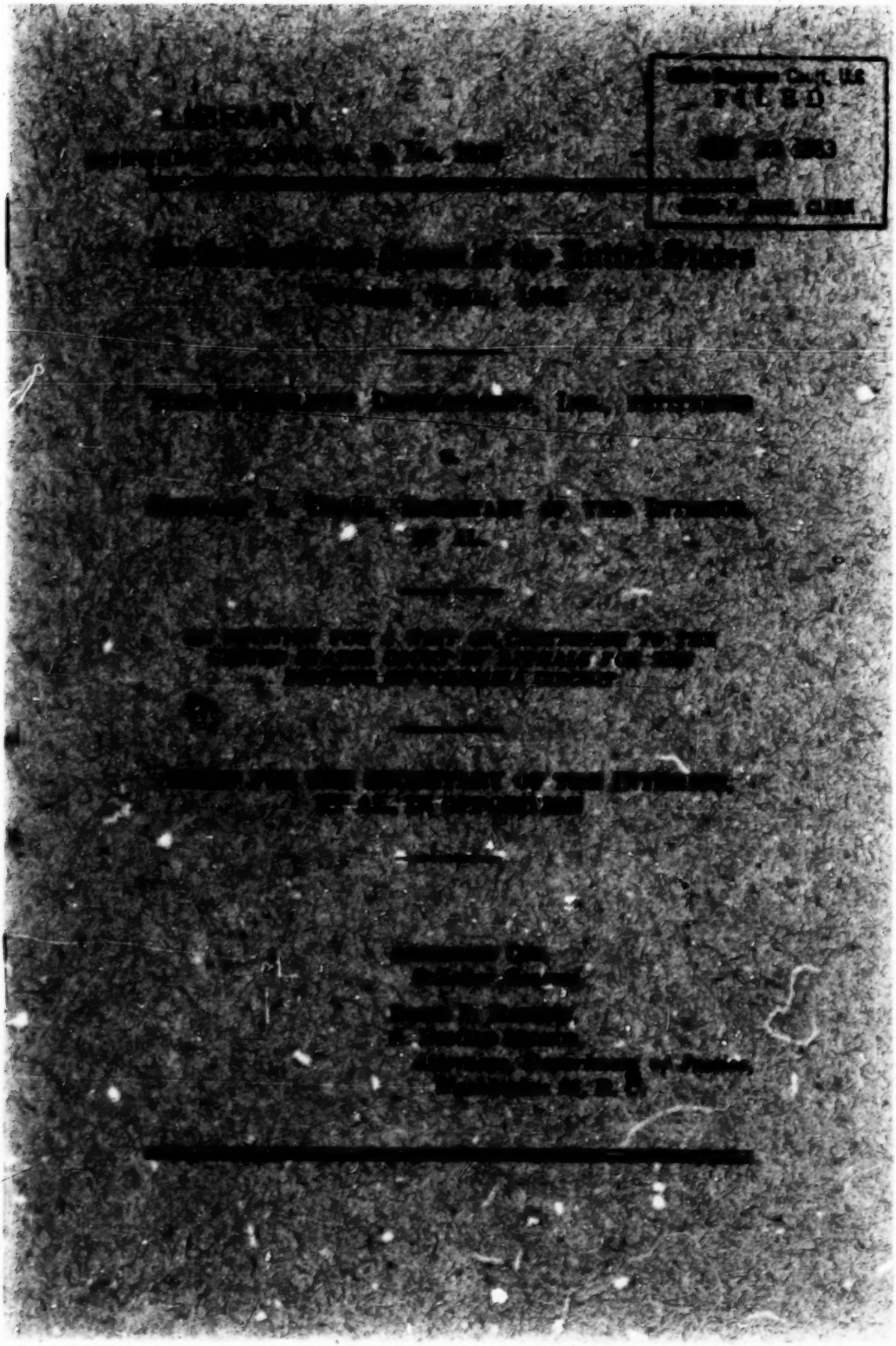
For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

LEWIS E. HOFFMAN
Suite 404
711 - 14th Street, N.W.
Washington 5, D. C.

LEON BENEZRA
810 - 18th Street, N.W.
Washington 6, D. C.

Counsel for Intervenor-Respondent

MAY, 1963



INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulation involved	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Andrews, Margaret A., et al., 64 I.D. 9	5
Boesche v. *Udall*, No. 332, this Term	4
Commissioner v. *South Texas Co.*, 333 U.S. 496	7
Fawcus Machine Co. v. *United States*, 282 U.S. 375	7
Fleming v. *Mohawk Co.*, 331 U.S. 111	7
Helvering v. *Reynolds Co.*, 306 U.S. 110	6
McKay v. *Wahlenmaier*, 226 F.2d 35	4-5
McLennan, United States ex. rel. v. *Wilbur*, 283 U.S. 414	4
Miller v. *Udall*, 307 F.2d 676, certiorari denied, 371 U.S. 967	5
Morrissey v. *Commissioner*, 296 U.S. 344	6
National Broadcasting Co. v. *United States*, 319 U.S. 190	7
Signal Oil and Gas Company, I.D. No. A-28626	5
United States v. *Shimer*, 367 U.S. 374	6
Wright v. *Paine*, 289 F.2d 766	3

Statute and regulation:

	Page
Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*	2
Sec. 17(a), 30 U.S.C. 226(a)	4
Sec. 17(c), 30 U.S.C. 226(c)	2, 4
Sec. 17(d), 30 U.S.C. 226(d)	5
Sec. 32, 30 U.S.C. 189	5
43 C.F.R. 192.43	3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1035

THOR-WESTCLIFFE DEVELOPMENT, INC., PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR, ET AL., IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-22) is reported at 314 F.2d 257. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1963 (Pet. App. 23). The petition for a writ of certiorari was filed on April 19, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statutory provision requiring issuance of non-competitive oil and gas leases on public lands to "the person first making application who is qualified to hold a lease" is violated by a regulation of the Secretary of the Interior which treats as simultaneously filed all lease offers filed within a five-day period.

STATUTE AND REGULATION INVOLVED

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 443, as amended, 30 U.S.C. (Supp. IV) 226(c), and 43 C.F.R. 192.43(a) and (b) are set forth at pp. 2-3 of the petition.

STATEMENT

Petitioner brought this suit against the Secretary of the Interior seeking a declaration of its rights to lease, under the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*, certain lands in the public domain located in Wyoming, Utah and New Mexico (Jt. App. 3-15).[1] The lands involved were subject to oil and gas leases which expired by operation of law on June 30, 1961, at the end of their terms (Jt. App. 4-5, 6, 7). Petitioner filed its offers to lease these lands on July 3, 1961, the first time the land offices for New Mexico, Utah and Wyoming were open after the expiration

[1] Jt. App. refers to the joint appendix printed in the court of appeals.

of the previous leases (Jt. App. 5, 6-7, 8). The subordinate officials of the Department of the Interior, acting in accordance with the controlling regulation, 43 C.F.R. 192.43, rejected these offers on the ground that the regulation provides that lands in leases which expire at the end of their terms become available for further leasing only after the description of such lands has been posted on the land office bulletin board[2] (Jt. App. 5-6, 7, 8, 58-61). The lands involved in this case were first open to simultaneous filing from July 17, 1961, to July 24, 1961 (*ibid.*). Petitioner filed no application during this period, and other applicants were eventually found to be entitled to leases.

In its suit for declaratory judgment, petitioner asked that the regulation be declared invalid, that the lands be declared available for leasing on July

---

[2] Prior to the adoption of the current regulation, 43 C.F.R. 192.43, in December 1959, lands covered by leases which expired at the end of their terms generally became available for new lease offers the next day the land office was open for business. See *Wright* v. *Paine*, 289 F.2d 766 (C.A. D.C.). Where leases were cancelled, voluntarily relinquished or terminated by operation of law for failure to pay rent, the lands became available for new offers only after notation of the cancellation, relinquishment or termination on the official records of the land office (Jt. App. 39-40).

[3] In substance, this regulation provides that on the third Monday of each month there will be posted on the bulletin board of each land office a list of lands on which leases expired, were cancelled, relinquished, or terminated and which will become available for leasing on the fifth working day thereafter. These lands are subject to simultaneous filings of lease offers from the time the notice is posted until the fifth day. If more than one offer is filed in this period, the priorities are determined by a public drawing.

3, 1961, and that petitioner be declared the first qualified applicant (Jt. App. 13-14). On cross-motions for summary judgment, the district court dismissed the petitioner's suit with prejudice (Jt. App. 113-114). The court of appeals affirmed on the ground that it was within the authority of the Secretary to promulgate a regulation implementing the statutory language "person first making application,"[1] and that the regulation, 43 C.F.R. 192.43, was neither unreasonable nor inconsistent with the plain language of the Mineral Leasing Act, having in mind the purpose of the statute and the experience of the Secretary in its administration.

ARGUMENT

Section 17(a) of the Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(a), provides that lands on the public domain which are known or believed to contain oil or gas deposits may be leased by the Secretary. Whether to lease or not is entrusted to his discretion. *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414. However, if the Secretary leases lands which are not within any known geological structure of a producing oil or gas field, the statute requires that he issue the lease to "the person first making application for the lease who is qualified to hold a lease * * *." Section 17(c), Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(c); *McKay* v. *Wahlen-*

[1] Sec. 17(c), Mineral Leasing Act of 1920, as amended, 74 Stat. 782, 30 U.S.C. 226(c). This is the same provision as the one involved in *Boesche* v. *Udall*, No. 332, this Term.

maier, 226 F.2d 35, 37 (C.A. D.C.). These are known as noncompetitive leases, *i.e.*, they are issued without competitive bidding at a fixed rental per acre, now usually 50¢ per acre per year. Section 17(d), Mineral Leasing Act, *supra*, 30 U.S.C. 226 (d). In his administration of the Mineral Leasing Act, the Secretary is generally authorized to prescribe necessary and proper rules and regulations to carry out and accomplish the purposes of the Act. Section 32, Mineral Leasing Act of 1920, 41 Stat. 450, 30 U.S.C. 189.

In executing this program, the Secretary has encountered serious problems in determining the "person first making application" for noncompetitive leases on lands which have previously been under lease. Such lands, even though they may not be on a producing structure, frequently have a speculative market value far in excess of the 50¢ per acre fee charged by the government. When the prior lease term is about to expire, there are many strategems which may be employed, both by the prior lessee and others, to secure the new lease.[*] The administrative problem is to give all interested applicants an equal chance to secure the new lease.

The Secretary's solution to the problem is the amended regulation, 43 C.F.R. 192.43, which (1)

---

[*] Examples of devices used in the race to be first are found in *Miller* v. *Udall*, 307 F.2d 676 (C.A. D.C.), certiorari denied, 371 U.S. 967; *Signal Oil and Gas Company*, I.D. No. A-28626; *Margaret A. Andrews et al.*, 61 I.D. 9. Some of the administrative problems are described in the Hochmuth affidavit at Jt. App. 39-42.

withholds the lands from leasing and lease applications until notice of the expiration of the earlier lease is posted, (2) provides that all applications filed within five business days thereafter shall be regarded as having been filed simultaneously, and (3) provides that priorities among such filings shall be determined by public drawing. The petitioner seeks to invalidate the regulation on the ground that the statute requires the issuance of the new lease to the applicant who is first in point of time after the expiration of an existing lease and without regard to the posting of notice of availability which the regulation contemplates.

The court of appeals, in deciding this case, applied two legal principles. The first one is that the Secretary is entitled to issue regulations for determining who is "the person first making application," unless this statutory language is so definite as to render an interpretative or implementing regulation inappropriate. The court found the implementing regulation permissible. The application of this principle is in accord with the decisions of this Court. *Helvering* v. *Reynolds Co.*, 306 U.S. 110, 114; *Morrissey* v. *Commissioner*, 296 U.S. 344, 354-355.

The second legal principle is that regulations by an administrative agency in the field entrusted to its administration by Congress are to be upheld unless unreasonable or plainly inconsistent with the authorizing statute. This concept, expressed in slightly differing terms, is found throughout the decisions of this Court dealing with judicial review of administrative regulations. See, *e.g.*, *United States* v. *Shimer*, 367 U.S.

374, 381-382; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 209 *et seq.*; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378. The court of appeals decided that the regulation which petitioner attacks is neither unreasonable nor inconsistent with the plain language of the Mineral Leasing Act.

Both courts below applied the correct legal principles to test the validity of the regulation. The decision below does not conflict with any decision of this Court or of any other court of appeals. There is no important question of federal law involved requiring determination by this Court. There is no conflict with state law. Accordingly, there is no occasion for further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

MAY 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963